

May 2, 2005

Dianne Fritz
Mariposa County
Board of Supervisors
P.O. Box 784
Mariposa, CA 95338

Re: Your Request for Informal Assistance
Our File No. I-05-072

Dear Ms. Fritz:

This letter is in response to your request on behalf of yourself Dianne Fritz, a member of the Mariposa County Board of Supervisors, for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Because you do not seek advice regarding a specific governmental decision, we can provide you only informal assistance.² Also please note that the Commission does *not* provide advice relating to past conduct and can only advise prospectively. (Regulation 18329(b)(8)(A).)

QUESTION

As a member of the Mariposa County Board of Supervisors and a local business owner, may you participate in revisions to the county's sign ordinance?

CONCLUSION

You will have a conflict of interest only if it is reasonably foreseeable that the decision will have a material financial effect on your economic interests. See discussion below.

FACTS

You are a recently elected supervisor to the Mariposa County Board of Supervisors. You are also an owner/partner of a local business. This local business has a

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Regulation 18329(c), enclosed.)

sign that has been the subject of a dispute between you and the county over whether it complies with the current Mariposa County Sign Ordinance.

Prior to you being a member of the board of supervisors you participated in the local task force that provided recommendations to the board of supervisors regarding the sign ordinance as well as other issues.

You and your husband are the *primary* owners of the business and although you do not participate in the daily operations of the business you do retain an ownership interest.

You seek advice regarding whether you may vote and participate in revisions to the county's sign ordinance. You also wish to know if your husband may participate in committees and other groups that make recommendations to the board of supervisors regarding the sign ordinance.

ANALYSIS

Conflict of Interest Prohibition

Your questions implicate the Act's conflict-of-interest provisions which ensure that public officials "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Specifically, section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

A public official has a "financial interest" in a governmental decision within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family or on any of the official's economic interests. (Section 87103; regulation 18700(a).) The Commission has adopted a standard eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).)³

1. Are you considered a public official?

The conflict of interest prohibition only applies to public officials. (Section 87100.) As a member of the Mariposa County Board of Supervisors, you are a "member officer, employee or consultant of a state or local government agency" and are, therefore,

³ The Commission document "Can I Vote? Conflicts of Interest Overview" explains this analysis further and is enclosed for your information.

a public official subject to the conflict-of-interest provisions of the Act. (Section 82048; regulation 18701(a).)⁴

2. Will you be making, participating in making, or influencing a governmental decision?

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (See regulation 18702.1.)

You will “make a governmental decision” if you vote on revisions to a sign ordinance. In addition to actually voting on these matters, if you engage in negotiations without significant substantive review, provide advice or make recommendations, you will be “participating” in a decision. (Regulation 18702.2.) You will also be “influencing” that decision if you appear before or otherwise attempts to influence any member, officer, employee or consultant of the agency. (Regulation 18702.3.)

Exceptions: The only possible exceptions that may apply are found in regulation 18702.4(b)(1)(A-C). Even if a conflict of interest is present, a public official may appear before his or her agency as a member of the general public in the course of its prescribed governmental function in order to represent himself or herself, but only in regard to matters related solely to his or her personal interests, including, but not limited to: “(A) An interest in real property which is wholly owned by the official or members of his or her immediate family. (B) A business entity wholly owned by the official or members of his or her immediate family. (C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control.” (*Ibid.*) Based on your facts, it does not appear that you qualify under this exception because your business is not wholly owned and it does not appear that you and/or your husband exercise *sole direction and control* over the business.

3. What are your economic interests?

Section 87103 provides that a public official has a “financial interest” in a governmental decision “if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family,” or on any of the official’s economic interests, described as follows:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment⁵ of \$2,000 or more (Section 87103(a);

⁴ You have asked about whether your husband may participate in committees that make recommendations to the Board of Supervisors regarding revisions to the county sign ordinance. The Act applies only to public officials. It is unclear whether your husband is a public official who would be subject to duties under the act. Your husband should contact us for advice if he is a public official.

- regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); regulation 18703.1(b));
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b); regulation 18703.2);
 - A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); regulation 18703.3);
 - A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to \$360 or more within 12 months prior to the decision (Section 87103(e); regulation 18703.4);
 - A public official has an economic interest in his or her personal finances, including those of his or her immediate family -- this is the “personal financial effects” rule (Section 87103; regulation 18703.5).

Business Entity, Source of Income: You state in your letter that you are an “owner/partner” of a local business but do not participate in its daily operations. Thus, by virtue of your position as a partner, you have an economic interest in a business entity. (Section 87103(a).) Also, assuming that you received \$500 or more from the business within the past 12 months, it is also considered a source of income to you. (Section 87103(c).) Finally, you have an investment interest in the business. (Section 87103(a).)

You have not identified other economic interests such as *other sources of income*⁶, *real property or other businesses* you may own, therefore we do not include them in our analysis, but point out that you must still determine whether a conflict of interest will arise from any of them (i.e., whether it is reasonably foreseeable that the governmental decision you participate in will result in a material financial effect on any of these economic interests).

⁵ An indirect investment or interest means any investment or interest owned by the spouse of an official or by a member of the official’s immediate family, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official’s immediate family, or their agents own directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103.) “Immediate family” is defined at section 82029 as an official’s spouse and dependent children.

⁶ Income of an individual also includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially a 10 percent interest or greater. (This also includes the official’s community property interest in his or her spouse’s income). (Section 82030.) You stated that you and your husband are “primary” owners of the business, suggesting that there are other partners. Assuming that your interest is at least 10 percent of the business, you will have an economic interest in every client of the business that pays the firm a sufficient amount such that your pro-rata share of the income equals \$500.

Personal Finances: You also have an economic interest in your personal finances and those of your immediate family. (Section 87103; regulation 18703.5.) A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets or liabilities of yours or your immediate family increasing or decreasing. (*Ibid.*)

Your letter does not mention any impact on your personal finances as the result of a revision in the county's sign ordinance. But note that a conflict of interest may arise if it reasonably foreseeable that the decision will have an effect on your personal finances.

4. Are your economic interests directly or indirectly involved in the governmental decision?

A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official's agency when that person, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or; (2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.” (Regulation 18704.1, subdivision (a).)

Based on the information you have provided, it appears that your business is not a named party in, nor the subject of the proceedings concerning the proposed revisions to the sign ordinance. Thus, your business is indirectly involved in the decision.

Personal Finances: A public official or his or her immediate family is deemed directly involved in a governmental decision which has *any* financial effect on his or her personal finances or those of his or her immediate family. (Regulation 18704.5) You did not specify what economic effect, if any, the governmental decision would have on your personal finances, but if there is any impact at all, you are considered directly involved.

5. & 6. What is the applicable materiality standard and is it reasonably foreseeable that the financial effect of the governmental decision upon your economic interests will meet the applicable materiality standard?

The financial effect of a governmental decision on a small business entity, which is not directly involved in the decision, is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year in the amount of \$ 20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$ 5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$20,000 or more.” (Regulation 18705.1, subdivision (c)(4).)⁷

This materiality standard is applicable to your local business, which is also a source of income to you.

Personal Finances: A reasonably foreseeable financial effect on a public official’s personal finances is *material if it is at least \$250 in any 12-month period*.

However, when determining whether a governmental decision has a financial effect on a public official’s economic interest in his or her personal finances, neither a financial effect on the value of real property owned directly or indirectly by the official, nor a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which the official has a direct or indirect investment interest shall be considered. (Regulation 18705.5(a).)

You have not provided any information regarding possible financial effects of revisions to the sign ordinance. Therefore, we are unable to determine whether there will be a material financial effect based on this decision.

Foreseeability: A material financial effect on an economic interest is reasonably foreseeable if it is substantially likely that one or more of the materiality standards applicable to that economic interest will be met as a result of the governmental decision. (Regulation 18706(a).) A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Please note that the Commission does not act as a finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Therefore, the determination of whether or not it is reasonably foreseeable that the applicable materiality standard will be met for your business is necessarily a factual question that is ultimately for you to decide.

⁷ Please refer to the enclosed copy of Regulation 18705.1 for the criteria applicable to businesses of different sizes.

Because the Commission is not a finder of fact, you must make a good faith effort to assess whether your economic interest(s) will experience a financial effect which rises to the monetary thresholds provided above.

As a public official, you must make a good faith effort to assess the effect of the decision by using some reasonable and objective method of valuation. (*Moock* Advice Letter, No. A-01-150.) If you determine that your economic interest will be materially affected as a result of the sign ordinance decision before the county board of supervisors, you will have a conflict of interest in that decision.

7. & 8. The public generally and legally required participation exceptions.

An official who otherwise has a conflict of interest in a decision may still participate under the “public generally” exception. This exception applies when the financial effect of a decision on a public official’s economic interests is substantially the same as the effect on a significant segment of the public.

The “legally required participation” rule applies when the official’s participation in a governmental decision is legally required. (Section 87101; regulation 18708.) You have not presented any facts indicating that these exceptions are applicable to your situation; therefore we do not address them here.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

Enclosures

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